

IN THE
United States Court of Appeals
For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petitions for Review of the Decisions of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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PREVIOUS OPINIONS

The first findings of fact and opinion of the Tax Court (R. 11-27. No. 14760) are reported at 23 T. C. 495. The former opinion of this Court is reported at 238 F. 2d 148. The memorandum findings of fact and opinion of the Tax Court on remand from this Court (R. 22-27) are not officially reported.

JURISDICTION

The Commissioner determined that there were deficiencies in the individual income taxes of Jack Showell and Dorothy Showell for the year 1949 in the amounts of \$3,946.65 and \$4,065.69 respectively. Notices of these deficiencies, dated February 26, 1953 (R. 6, 11. No. 14760) were mailed to the taxpayers individually. Individual petitions for redetermination of these deficiencies were filed in the Tax Court by each of the taxpayers, within the permitted 90-day period, on April 30, 1953, under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 4-6, 121. No. 14760) On January 26, 1955, the Tax Court entered decisions that there were deficiencies in the income tax of Jack Showell and Dorothy Showell, for the year 1949, in the amounts of \$3,286.65 and \$3,392.25, respectively. (R. 27-28. No. 14760.) Separate petitions for review by this Court were filed by each of the taxpayers on March 9, 1955. (R. 29-32, 121. No. 14760.) This Court had jurisdiction of these petitions for review under the provisions of Section 7482 of the Internal Revenue Code of 1954.

On October 10, 1956, this Court remanded the cases to the Tax Court "on the ground that the findings were not sufficiently definitive." 238 F. 2d 148, 153. A petition for rehearing filed by the taxpayers was denied on November 21, 1956. The mandate from this Court to the Tax Court was filed in the Tax Court on December 3, 1956. (R. 5.) On January 2, 1957, taxpayers filed in the Tax Court a motion to conform the judgment of that court to the findings and on January 23, 1957, a hearing was held on this motion. (R. 5.) On January 31, 1957, memorandum findings of fact and opinion were filed. (R. 22-27.) On May 27, 1957, the

Tax Court entered decisions that there were no deficiencies due from or overpayments due to the taxpayers of income tax for the year 1949. (R. 27-29.) On July 11, 1957, taxpayers filed petitions for review by this Court. (R. 6, 29-33.) Taxpayers invoke the jurisdiction of this Court under the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.¹

QUESTION PRESENTED

Whether the Tax Court's decisions of May 27, 1957, entered pursuant to its memorandum findings of fact and opinion of January 31, 1957, comply with the conditions of this Court's remand of the Tax Court's previous decisions.

STATEMENT

The Tax Court made findings of fact as follows (R. 23):

The taxpayers, Jack Showell and Dorothy Showell, are husband and wife and filed their separate income tax returns for 1949, prepared on the community basis, with the Collector for the district of Arizona.

In their returns for 1949 the taxpayers reported income from interest, from a partnership, and rental income from a building. No income was reported from,

¹ There is a substantial question as to whether the taxpayers' petitions for review were timely filed and, as a result, whether this Court has jurisdiction. See Section 7481 of the Internal Revenue Code of 1954. This depends on whether this Court's mandate was a directive for a rehearing. Cf. *McGah v. Commissioner*, 210 F. 2d 769 (C.A. 9th); *Cherokee Textile Mills v. Commissioner*, 106 F. 2d 685 (C.A. 6th); *Virginia Lincoln Furniture Corp. v. Commissioner*, 67 F. 2d 8 (C.A. 4th). *Crews v. Commissioner*, 120 F. 2d 749 (C.A. 10th), certiorari denied, 314 U.S. 664.

or loss deducted with respect to, any wagering operations.

During 1949 Jack Showell, received money from booking bets on baseball, football and basketball games. No receipts or tickets were given for money placed on bets. Showell did not keep regular, adequate and permanent books and records of his wagering transactions.

Showell had unreported income from wagering operations in 1949 amounting to \$19,563.66.

SUMMARY OF ARGUMENT

1. The Tax Court's decisions, entered pursuant to its memorandum findings of fact and opinion, fully comply with the directions of this Court remanding the earlier Tax Court decisions. There is no longer any inconsistency between the findings of fact of the Tax Court and its conclusion. The Tax Court's findings are no longer in the nature of a "reporter's condensed report of the testimony." The Tax Court has found as fact only those things which it believes to be true. It has made it clear that the case presents purely a factual question and that on the basis of the evidence presented, it is "unconvinced" that Showell had gambling losses in the amount set forth on his summary record. It has characterized the evidence as "unsatisfying", but exercising its prerogatives as the trier of fact—prerogatives which this Court specifically recognized in its prior opinion—it has found that Showell did have gambling losses of \$3,000 in addition to those allowed by the Commissioner. Thus, we submit that none of the difficulties existing in the prior Tax Court findings of fact and opinion are present in the instant case and, accordingly, the decisions of the Tax Court should be affirmed.

2. The taxpayers should not be permitted in this appeal to raise the same questions which they raised in the earlier appeal and which this Court decided adversely to them. This Court's decisions on the legal questions presented have become the law of the case and there is no reason, whatever, why taxpayers after presenting such argument in a brief, reply brief, oral argument and petition for rehearing should once again be allowed to present the same contentions. This Court has already correctly decided those questions, and the Tax Court decisions correctly apply the law as laid down by this Court. The fact that this Court remanded the earlier case because of a dissatisfaction with the Tax Court findings should not be sufficient to create a vehicle by which the taxpayers are given another full hearing on the same legal questions.

Since the Tax Court's decisions fully comply with the terms of this Court's remand its decisions should be affirmed.

ARGUMENT

The Tax Court's Decisions Fully Comply With the Conditions of This Court's Remand of Earlier Decisions

This is the second time that the instant case has come before this Court. In its prior review of this case (No. 14760) this Court remanded to the Tax Court "on the ground that the findings [of the Tax Court] were not sufficiently definitive." *Showell v. Commissioner*, 238 F. 2d 148, 153. The taxpayers then filed a petition for rehearing which was denied by this Court. Thereafter the case was reconsidered by the Tax Court in view of the mandate of this Court, new findings of fact were made, a new opinion written and decisions were entered. The only issue presented then by these petitions

for review is whether the new Tax Court decisions, are proper in view of this Court's opinion in the prior case and its further opinion denying taxpayers' petition for rehearing. We submit that the Tax Court decisions, now under review, are in all respects in compliance with those opinions of this Court and should, accordingly, be affirmed.

1. In the prior case, this Court characterized the Tax Court's findings which were then before it as "a summary of the evidence" which were "so indecisive * * * that they really lack[ed] the elements of decision" and stated that the findings were "more a reporter's condensed report of the testimony" than findings of fact. 238 F. 2d 148, 152. The Court recognized though that such findings could be explained by the state of the record—the fact that all of the testimony in the case was presented by the taxpayers. The Court found that there was an inconsistency existing between the findings of the Tax Court and its ultimate conclusion; for while the findings apparently accepted all of the taxpayers' evidence concerning the manner in which Showell's record of gambling activities was maintained, the Tax Court's conclusion apparently did not regard such evidence as accurate and therefore did not give effect to those findings. As a result, then, of this inconsistency and of the reportorial nature of the Tax Court's findings this Court remanded to the Tax Court.

In the course of its opinion remanding the case to the Tax Court, this Court noted, however, that it was entirely proper for the Commissioner to make a determination that a deficiency existed, by accepting the left hand (gain) column of Showell's record of bookmaking activities, while ignoring the right hand (loss) column, since the stated amount of gains could be considered as

admissions against interest. The Court further noted that it was also proper for the Tax Court either to adopt this theory or modify it, as it did, by finding that some additional² losses were incurred, or that the Tax Court could reject that theory completely. The Court made it clear that its dissatisfaction with the Tax Court's conclusions under review in the prior appeal was based upon the fact that such conclusions could only be justified by disbelief of or dissatisfaction with the testimony of record, but the findings were "not sharp enough" to indicate such a disbelief. 238 F. 2d 148, 153. However, the possibility that "on the remand * * * the Tax Court * * * [might] come up with the same result * * * [or] reach another result either more or less favorable to the taxpayer" was expressly left open. 238 F. 2d 148, 152. It was also pointed out in this Court's opinion that it was not necessary for the Tax Court to give full credence to the testimony of taxpayer, Jack Showell, or his close office associate and that the Tax Court had "the right to remain unconvinced, to retain an abiding doubt, and to rule against the petitioner [Showell]." 238 F. 2d 148, 152.

It is in this posture, then, that the instant petitions for review must be considered in order to determine whether the Tax Court decisions are proper in view of the prior remand.

We submit that the Tax Court has properly exercised its prerogatives as the trier of fact and that its decisions are correct in view of the prior opinions of this Court and should, accordingly, be affirmed. In its memorandum findings of fact and opinion, the Tax

²The figures in the "gains" column were presumably net results of the bookmaking activities and therefore took into account some losses. (See R. 25.)

Court has now made it plain that the issue presented in this case is purely factual.³ The memorandum findings of fact and opinion of the Tax Court no longer contain the inconsistency which existed in the prior findings of fact and opinion; the Tax Court opinion leaves no room for doubt that it did not accept fully Showell's evidence to the effect that he had losses from gambling in the amount claimed. After studying the record before it, the Tax Court has now stated that it was "unconvinced" that Showell had losses in the amount claimed. In so doing, it was exercising an option expressly granted to it by this Court's opinion in the prior case. The Tax Court has this time carefully refrained from making any findings of fact as to the manner in which Showell's record of bookmaking activities was maintained; for, to have done so, would have given an impression, as it apparently did in the prior case, that the record of bookmaking activities was *accurately* maintained and was in all respects true. Instead, the Tax Court had made findings of fact which contain only those facts which it has found to be true. Thus, the Tax Court found that "the petitioner [Showell] did not keep regular, adequate and

³ The Tax Court has consistently treated cases of this type as factual and has reached varying results depending upon its appraisal of the evidence in each case. See e.g. *Rainwater v. Commissioner*, 23 T.C. 450; *Nemmo v. Commissioner*, 24 T.C. 583; *Nellis v. Commissioner*, decided February 28, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,050), affirmed, 232 F. 2d 890 (C.A. 6th); *Max Fogel v. Commissioner*, decided June 30, 1955 (1955 P-H T.C. Memorandum Decision, par. 55,186), affirmed, 237 F. 2d 917 (C.A. 6th); *Robert Fogel v. Commissioner*, decided June 30, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,185), affirmed, 237 F. 2d 918 (C.A. 6th); *Federika v. Commissioner*, decided June 28, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,172), affirmed, 237 F. 2d 916 (C.A. 6th), certiorari denied, 352 U. S. 1025, rehearing denied, 350 U. S. 931.

permanent books and records of his wagering transactions.” (R. 23.)

In its opinion, the Tax Court has shown that it has carefully considered this Court’s opinion in the prior case and has applied the legal principles contained therein. It has restated the familiar rule that it is the taxpayer’s burden to prove error in the Commissioner’s determination, that is to prove that he incurred losses from gambling in the amounts contended for. The Tax Court opinion reviews the evidence in the case and points out that the only evidence offered to substantiate the existence of the losses claimed is Exhibit 3, the summary sheet of yellow foolscap which showed net amounts of gains and losses on stated dates throughout the tax year. The Tax Court additionally points out (R. 26) that neither the Commissioner nor the Tax Court had any way of testing the accuracy of the totals appearing on the summary sheet unless “we accept as wholly true the testimony of petitioner [Showell] and his accountant that every actual gain or loss was correctly entered thereon”. And further applying the principles laid down by this Court in its prior opinion, the Tax Court states that “On this record we are unconvinced that the petitioner suffered wagering losses to the extent claimed”. Commenting on the unsatisfactory state of the evidence, the Tax Court adds, however, that it did “believe” that Showell did suffer some losses in addition to those allowed by the Commissioner in his determination and finds as fact that Showell had unreported income from wagering operations in 1949 in the amount of \$19,563.66, thus allowing the taxpayers losses of \$3,000 in addition to that determined by the Commissioner. (R. 23, 26.)

This Court’s prior opinion in this case indicated

that if there had been a Tax Court finding that the testimony was not satisfactory the Tax Court's prior decision would have been allowed to stand. In the findings and opinion entered after the remand by this Court, the Tax Court has expressly stated that "the evidence is unsatisfying" and that "we are unconvinced" by the record that Exhibit 3 was an accurate statement of the taxpayer's bookmaking activities for the year. (R. 26.) Also, in its prior opinion, this Court expressed concern that the absence of records should not cause an "innocent individual * * * to be ruined simply because he has lost the records, if his testimony or remaining skimpy records import honesty". This Court stated that it "should be made clear" by the Tax Court that no absolute rule of law was being promulgated, but rather that the case was a factual one. 238 F. 2d, p. 153. This difficulty, too, has been eliminated by the new opinion of the Tax Court, which states (R. 26): "This is a fact case and what we have decided is necessarily limited to the facts before us".

Thus, we submit, the Tax Court has properly followed the dictates of this Court in its prior opinions. It has eliminated the inconsistency existing in its first opinion, it has expressly pointed out that the evidence was "unsatisfying" and that it was "unconvinced" by the taxpayer's evidence, and that the decision was to "create no such overriding precedent for the future" (238 F. 2d, p. 153) that any individual who might have lost his records would on that score alone be forced to lose any deductions which might have otherwise been available to him. In all respects, then, the Tax Courts' decisions are in complete accord with the mandate of this Court and accordingly should be affirmed.

2. The taxpayers, however, are attempting to use this Court's remand of the prior decisions as an opportunity to receive a full and complete new hearing on issues which have already been presented to this Court and decided adversely to them. Thus, the taxpayers argue (Br. 16-23) to the effect that it was improper for the Commissioner to make a determination based upon an acceptance of the left-hand (gains) column of Exhibit 3, while rejecting the right-hand (losses) column, despite the fact that in this Court's prior opinion it stated (238 F. 2d, p. 152):

Just as the Tax Court reasons, we see no objection, in the absence of better evidence, to the Commissioner using the left hand figures as income on the theory of admissions against interest. If the findings were a little different here, we would find no objection to the Tax Court reaching the result it did in allowing the taxpayer only \$3,000.00 on the right hand side of Exhibit 3 for deductions on their wagering operations''.

The taxpayers' argument that the Commissioner has not used a proper method of accounting fails to take into account that the Commissioner has not *changed* the method of accounting used by the taxpayers. He has not made a determination that the taxpayers, who may have been on a cash basis of accounting, should have been on an accrual basis of accounting, or *vice versa*. The Commissioner has merely put the taxpayers to their proof that they did incur gambling losses in order to entitle the taxpayer to deductions under Sections 23(h) of the Internal Revenue Code of 1939. It is well settled that deductions are a matter of legislative grace and as pointed out by this Court in its prior opinion, "the burden of proof is on the taxpayer to

same legal contentions which they have urged before this Court in a brief, reply brief, oral argument, and petition for rehearing and which have all been rejected by this Court. This Court's decision on these questions has become the law of the case. *Todd v. Commissioner*, 165 F. 2d 781 (C. A. 9th). The only question which is open in these petitions for review is whether the Tax Court decisions are proper in view of this Court's opinions remanding the prior Tax Court decisions. As we have shown, each of the difficulties which this Court found existing in the prior Tax Court findings and opinion has been remedied in its new findings and opinion. Accordingly, its decisions should be affirmed.

CONCLUSION

For the reasons stated, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

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